IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CHARLES ZACHERY ALEX WASKEY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11020 Trial Court No. 3NA-10-027 CR MEMORANDUM OPINION No. 6061 — June 18, 2014

Appeal from the Superior Court, Third Judicial District, Naknek, Fred Torrisi, Judge.

Appearances: Doug Miller, Law Office of Douglas S. Miller, Anchorage, for the Appellant. Ann B. Black, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.[*]

Judge MANNHEIMER.

Charles Zachery Alex Waskey was convicted of first-degree sexual assault and a merged count of second-degree assault for beating and sexually assaulting a

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

woman in the village of Newhalen. (Waskey was also convicted of a separate count of fourth-degree assault for injuring a state trooper who was trying to take him into custody.)

In this appeal, Waskey argues that the evidence presented at his trial was legally insufficient to support the jury's verdict on the sexual assault charge. More specifically, Waskey argues that no reasonable person could have believed the victim's testimony regarding the sexual assault, given the conflicts in the evidence and given the circumstances in which the victim first reported the rape.

Waskey's argument hinges on viewing the evidence in a light favorable to him. Indeed, Waskey's argument on appeal resembles the argument that Waskey's trial attorney might have made to the jury. But this Court is required to view the evidence in the light most favorable to upholding the verdict.[1] Viewing the evidence in that light, the jurors could reasonably conclude that the victim's testimony was credible, and that Waskey had sexually assaulted her. We therefore conclude that the evidence was sufficient to support Waskey's conviction.

Waskey's remaining argument on appeal is that the sentencing judge should have referred his case to the statewide three-judge sentencing panel, with the suggestion that Waskey should receive a sentence below the applicable presumptive sentencing range because of his prospects for rehabilitation. But Waskey never asked the sentencing judge to do this, so he must now show that the judge committed plain error by failing to refer Waskey's case to the three-judge panel *sua sponte*.

Waskey argues that plain error occurred because, given this Court's decision in *Collins v. State*, 287 P.3d 791, 794-97 (Alaska App. 2012), it is obvious that

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[1] *See Silvera v. State*, 244 P.3d 1138, 1142 (Alaska App. 2010); *Morrell v. State*, 216 P.3d 574, 576 (Alaska App. 2009); *Daniels v. State*, 767 P.2d 1163, 1167 (Alaska App. 1989).

his case should have been sent to the three-judge panel because of his atypical potential for rehabilitation compared to other defendants convicted of sexual felonies.

We do not agree that obvious error occurred. In fact, it is not clear that *any* error occurred.

First, it is not clear what legal effect should be attributed to our decision in *Collins*, given the Alaska Legislature's prompt repudiation of *Collins*. See SLA 2013, ch. 43, § 22, which enacted AS 12.55.165(c), and see § 1 of that same session law, which explains that the Legislature viewed the dissent in *Collins* as expressing the proper interpretation of the prior version of the statute.

Second, even if *Collins* applies to Waskey's case, it still is not plain that Waskey's case should have been sent to the three-judge panel.

Collins was based on the conclusion that when the Legislature enacted the presumptive sentencing ranges for sexual felonies, the Legislature was acting on the assumption that sex offenders (as a group) had extremely poor prospects for rehabilitation. In *Collins*, we held that if the sentencing ranges were based on this assumption, then a sex offender who had only average prospects for rehabilitation would nevertheless have atypically good prospects for rehabilitation compared to the group of offenders that the Legislature had in mind.

But AS 12.55.165(b) declares that a sentencing court "may not refer a case to [the] three-judge panel based on the defendant's potential for rehabilitation" if the court finds one or more of a specified group of aggravating factors. Two of the aggravators in this group are AS 12.55.155(c)(8) (the defendant's history includes repeated instances of assaultive behavior) and AS 12.55.155(c)(21) (the defendant's history includes repeated instances of criminal behavior similar to the current offense).

In Waskey's case, the State proved (in fact, Waskey conceded) aggravators (c)(8) and (c)(21). Because these two aggravators were proved, the sentencing judge was

barred from referring Waskey's case to the three-judge panel based on Waskey's purported potential for rehabilitation.

For these reasons, the judgement of the superior court is AFFIRMED.